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No. .....

IN THE

Supreme Court of the United States

October Term, 1980

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner

v.

MICHAEL R. WENGER, Commissioner, West Virginia Department of Employment Security, J. F. McCLANAHAN, CLARENCE ELMORE, and JOHN T. POFFENBARGER, Members of the Board of Review,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The partially owned subsidiaries of Westinghouse Electric Corporation are as follows: Ateliers de Constructions Electriques de Charleroi, S.A. (ACEC); Compagnie des Dispositifs Semiconducteurs Westinghouse (CDSW); Electrocontroles Villares, Ltda.; Eletromar Industria Eletrica Brasileira, S.A.; Electromar Industria Eletrica Brasileira, S.A., Eletromar Nordeste, S.A.; Galileo Argentina C.I.F.S.A.; Hundt & Weber Schaltgerate GmbH; Ideal School Supply Company, Living & Learning (Cambridge), Ltd.; Mecanica Pesada, S.A.; Mex Control S.A. de C.V.; Motores Electricos de Juarez S.A. de C.V.; Offshore Power Systems (a partnership); Schneider S.A.; Silectra S.A. de C.V.; Societa Progettiazione Reattori Nucleari, S.p.A. (SOPREN); Tyree Industries Limited; W. T. Engineering Pty. Limited, Westralian Transformers Pty. Limited; Westrans (W.A.) Pty. Limited, Westralian Transformers Pty. Limited; Tyree-Power Construction Limited; Westinghouse Broadcasting Company, Inc., CATV Enterprises, Inc.; Westinghouse Broadcasting Company, Inc., Sutro Tower, Inc.; Westinghouse Broadcasting Company, Inc., Television Tower, Inc.; Westinghouse Canada Inc., Westinghouse de Venezuela, S.A. (VENWESA), Transformadores de Distribucion, S.A. (TRADESA); Westinghouse de Venezuela, S.A., Westinghouse Electro Metalurgicas C.A. (WEMCA); Westinghouse de Brasil S.A., CMW Sistemas, Ltda.; Westinghouse Electric S.A. (WELSA), Eurofuel; Westinghouse Electric S.A. (WELSA), Industry Services Company of Saudi Arabia, Ltd. (ISCOSA); Westinghouse Electric S.A. (WELSA), Galileo Argentina, C.I.F.S.A.; Westinghouse Electric S.A. (WELSA), Westinghouse, S.A. (WESA); Westinghouse Electric S.A. (WELSA), Westinghouse, S.A. (WESA), Westinghouse Proyectos Electricos, S.A. (WEPESA); Westinghouse Electric S.A. (WELSA), Westinghouse Asia Controls Corp.; Westinghouse Electric S.A. (WELSA), Westinghouse Supply Company of Saudi Arabia (WESCOSA); Westinghouse Electric S.A. (WELSA), IEM, S.A.; Westinghouse Electric S.A. (WELSA), IEM, S.A., Mex Control, S.A. de C.V.; Westinghouse Electric S.A. (WELSA), IEM, S.A., Silectra, S.A. de C.V.; Westinghouse Electric S.A. (WELSA), Wexico Systems and Services, Ltd.; Westinghouse International Power Systems Company, Inc., Offshore Power Systems (a partnership); Westinghouse (Jamaica) Ltd.; Westinghouse Proyectos Electricos, S.A. (WEPESA); Westinghouse World Investment Corporation, Ateliers de Constructions Electriques de Charleroi S.A. (ACEC); Westinghouse World Investment Corporation, Galileo Argentina, C.I.F.S.A.; Westinghouse World Investment Corporation, IEM, S.A.

The Petitioner, Westinghouse Electric Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on September 15, 1980.

QUESTION PRESENTED

May a state regulate the collective bargaining practices of an employer subject to the National Labor Relations Act by awarding statutory unemployment compensation benefits to striking employees based upon a determination by a state agency as to whether the employer had engaged in improper practices in its collective bargaining with those employees?

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The opinion of the Court of Appeals, dated September 15, 1980, not reported, appears in Appendix D hereto (1d-2d). The bench opinion of the United States District Court for the Southern District of West Virginia, delivered September 28, 1979, reproduced from transcript of same date, appears in Appendix A hereto (1a-7a). The order of the District Court denying Westinghouse Electric Corporation's motion for reconsideration, dated November 1, 1979, not reported, appears in Appendix B hereto (1b-2b). The memorandum order and opinion of the District Court, dated November 26, 1979, not reported, appears in Appendix C hereto (1c-7c).

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on September 15, 1980. This petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article VI, Clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the Contrary notwithstanding.

STATUTES INVOLVED

Section 21A-6-3(4) of the Unemployment Compensation Law of the State of West Virginia, W.Va. Code §21A-6-3(4) (1978), provides for the payment of unemployment compensation benefits to striking employees after a state unemployment compensation Appeals Tribunal, the West Virginia Unemployment Compensation Board of Review, or a reviewing state court determines that an employer has denied employees the right of collective bargaining under generally prevailing conditions:

§21A-6-3. Disqualification For Benefits.

Upon the determination of the facts by the commissioner, an individual shall be disqualified for benefits:

> (4) For a week in which his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory,

establishment or other premises at which he was last employed, unless the commissioner is satisfied that he was not (one) participating, financing, or directly interested in such dispute, and (two) did not belong to a grade or class of workers who were participating, financing, or directly interested in the labor dispute which resulted in the stoppage of work. *No disqualification under this subdivision shall be imposed* if the employees are required to accept wages, hours or conditions of employment substantially less favorable than those prevailing for similar work in the locality, or *if employees are denied the right of collective bargaining under generally prevailing conditions,* or if an employer shuts down his plant or operation or dismisses his employees in order to force wage reduction, changes in hours or working conditions. *Id.* [Emphasis supplied.]

The relevant provisions of The National Labor Relations Act, 29 U.S.C. §151, *et seq.* (1976) are set forth in Appendix E hereto (1e-3e).

STATEMENT OF THE CASE

In May 1979, Petitioner, Westinghouse Electric Corporation ("Westinghouse"), and the International Union of Electrical, Radio and Machine Workers (the "IUE"), the labor union representing production and maintenance workers at Westinghouse's Fairmont, West Virginia plant, entered into national collective bargaining negotiations. The 1979 Westinghouse-IUE national collective bargaining negotiations were conducted in Pittsburgh, Pennsylvania. These negotiations concerned 32 Westinghouse plants, located in 13 states, employing approximately 22,000 IUE-represented employees. When, on July 16, 1979, Westinghouse and the IUE were unable to reach agreement on a new contract, IUE-represented employees, including the production and maintenance employees at the Fairmont plant, began a strike at all Westinghouse plants. The strike continued until September 1, 1979, when Westinghouse and the IUE reached agreement.

Subsequently, over 1,700 production and maintenance employees at the Fairmont plant filed claims for unemployment compensation under Section 21A-6-3(4) of the Unemployment Compensation Law of the State of West Virginia, W.Va. Code §21A-6-3(4) (1978) ("Section 21A-6-3(4)"), alleging that Westinghouse had denied them "the right of collective bargaining under generally prevailing conditions" at the 1979 Westinghouse-IUE national negotiations. The total amount of these claims was approximately $1,500,000 and a hearing thereon was scheduled before a West Virginia Unemployment Compensation Appeals Tribunal on October 2, 1979. Under Section 21A-6-3(4), unemployment compensation is paid to striking employees if the state

authorities determine that the employer has committed an unfair practice in its collective bargaining with the employees.[1] Any unemployment compensation awarded to employees is charged against the employer's account with the state and, therefore, is ultimately paid by the employer.[2]

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1. Under the West Virginia Unemployment Compensation Law employees who were participating, financing or directly interested in the labor dispute which resulted in their unemployment are disqualified from receiving unemployment compensation benefits except where, *inter alia,* employees were "denied the right of collective bargaining under generally prevailing conditions," W.Va. Code §21A-6-3(4) (1978). The determination of whether employees were denied the right of collective bargaining under generally prevailing conditions is made by an Appeals Tribunal of the West Virginia Unemployment Compensation Board of Review, reviewed by the Board of Review and subject to review by a state court. In applying Section 21A-6-3(4), these state authorities and state courts conduct an extensive review of an employer's conduct during collective bargaining, often focusing on whether the employer has committed an unfair labor practice under principles similar to those under the National Labor Relations Act, *e.g., Metalab-Labcraft Equipment Co. v. Board of Review,* 11 (CCH) Unemployment Ins. Rep. ¶8266 (W.Va. Cir.Ct. 1968), while at the same time taking the position that they are not bound by the NLRB's determinations as to whether those acts by that employer violated the NLRA. *Rolland Glass Co. v. Board of Review,* 11 (CCH) Unemployment Ins. Rep. ¶8262 (W.Va. Cir.Ct. 1967).

2. See West Virginia Code, Section 21A-5-7(3) (1978). Under the West Virginia Unemployment Compensation Law, employers have individual accounts to which contributions (a percentage of the total payroll) are credited and from which benefits are debited. *Id.* The employer's contribution to the account is experience rated based on the amount of money in the account versus the amount of benefits paid out of the account.

Statement of The Case.

On September 25, 1979, Westinghouse filed a verified complaint in the United States District Court for the Southern District of West Virginia against Respondents, Michael R. Wenger, Commissioner, West Virginia Department of Employment Security and L. F. McClanahan, Clarence Elmore and John T. Poffenbarger, members of the West Virginia Unemployment Compensation Board of Review. This suit sought, *inter alia,* a declaratory judgment that the portion of Section 21A-6-3(4) which provides for awards of unemployment benefits to striking employees when a state tribunal determines that they were "denied the right of collective bargaining under generally prevailing conditions" is unconstitutional because that portion of the statute is preempted by the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.* (1976) (the "NLRA") and violates the supremacy clause of the United States Constitution, U. S. Const. art. VI, cl. 2. In addition to the request for a declaratory judgment, the suit sought an injunction against further proceedings by the state authorities regarding the award of unemployment compensation benefits.

After receiving oral argument and briefs from the parties, on September 28, 1979, the District Court, in a bench opinion, dismissed the complaint and held that Section 21A-6-3(4) was not preempted by the NLRA because it was part of a statute dealing with unemployment compensation and because the District Court believed that by reason of this Court's decision in *New York Telephone Co. v. New York State Department of*

Id. Thus, funds paid out of the account in the form of benefits are reflected in the employer's contribution rate. Therefore, benefits paid out of the account must be replaced by contributions by the employer.

Labor, 440 U.S. 519 (1979), the labor law preemption doctrine was inapplicable to the unemployment compensation area.

On October 2, 1979 and October 31, 1979, a West Virginia Unemployment Compensation Appeals Tribunal conducted a hearing on the unemployment compensation claims filed by the Fairmont production and maintenance employees. During this hearing the only testimony presented on behalf of the claimants was that of the IUE's chief national negotiator with Westinghouse and the President of IUE Local 627, the local which represents production and maintenance employees at the Fairmont plant. The unemployment compensation claims were solicited and prosecuted by the Union, not the individual claimants. The testimony of the Union witnesses was concerned exclusively with the conduct of the 1979 national collective bargaining negotiations between Westinghouse and the IUE and largely concerned events which transpired at Westinghouse plants other than Fairmont and outside the State of West Virginia. The Union claimed that the employer had committed, *inter alia,* the following unfair practices which it claimed should give rise to liability for unemployment compensation: (a) the alleged failure to present a "final proposal" as early as desired by the IUE; (b) the alleged failure to meet with the union on a particular day; and (c) a request to exclude a particular location from the national agreement. The IUE also filed a charge with the National Labor Relations Board claiming that these same alleged practices constituted an unfair labor practice under the National Labor Relations Act. In rebuttal, Westinghouse presented the testimony of two

of its principal labor negotiators who participated at 1979 national collective bargaining negotiations.[3]

Westinghouse filed in the District Court a Motion for Reconsideration of the Court's Denial of Injunctive and Declaratory Relief on October 10, 1979, together with an affidavit describing the testimony presented at the October 2, 1979 Appeals Tribunal hearing. On November 1, 1979, the District Court issued an order denying the Motion for Reconsideration and incorporated its prior bench opinion. (2b)

The District Court issued a Memorandum Order and Opinion and entered judgment dismissing the complaint on November 26, 1979. (7c) The District Court was of the opinion that although the West Virginia statute authorized adjudication of the propriety of an employer's practices during collective bargaining, that adjudication was permissible because the District Court read this Court's opinion in *New York Telephone* as holding that the preemption doctrine was totally inapplicable to the unemployment compensation area and that the states could award unemployment compensation benefits to

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3. On January 9, 1980, the Appeals Tribunal ruled that the claimants were disqualified from receiving unemployment compensation benefits pursuant to Section 21A-6-3(4) because they were not denied the right of collective bargaining under generally prevailing conditions, *In the Matter of William R. Bennett, et al. and Westinghouse Electric Corporation,* LD No. 79-236 (Jan. 9, 1980). The Board of Review affirmed, *In the Matter of William R. Bennett, et al.,* R. LD No. 80-1 (July 31, 1980). The claimants have petitioned for review of the Board of Review's decision, *William R. Bennett, et al. v. The Board of Review of the West Virginia Department of Employment Security, et al.,* No. 80-116 (Kanawha Cty., filed August 20, 1980), and that appeal is presently pending in the state court.

strikers on whatever basis they desired, including the determination that the employer had engaged in an unfair labor practice.[4]

In reaching the decision that Section 21A-6-3(4) is not preempted by the NLRA, the District Court, relying on this Court's decision in *Super Tire Engineering Co. v. McCorkle,* 416 U.S. 115 (1974), also ruled that the instant controversy would not be rendered moot by a favorable resolution for Westinghouse before the West Virginia Unemployment Compensation Appeals Tribunal, the Board of Review or a reviewing state court. It reasoned: ". . . the matter in conflict would be 'capable of repetition, yet evading review' even if the need for injunctive relief was rendered moot . . ." (2c) Similarly,

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4. The District Court reasoned:

"This Court views the *New York Telephone* case as explicating a congressional intent to leave the issue of the determination of eligibility for state unemployment compensation benefits to the states. Counsel for the Plaintiff contends that the statute involved in the New York Telephone case was a "neutral statute", while the West Virginia statute impermissibly intrudes into the preempted area of labor management relations and thus violates the Supremacy Clause of the United States Constitution. This Court has concluded that, regardless of the characterization of the determinations made by state officials pursuant to the state unemployment compensation act, the whole import of those determinations was to determine the eligibility of strikers for unemployment benefits. Notwithstanding the characterization of the determinations made by state officials, the result is merely the granting or denial of unemployment benefits under state law and, as such, falls within an area that is not preempted by federal labor law but it rather is left to the province of the states under the *New York Telephone* case." (5c-6c)

the District Court declined to abstain from deciding the matter in conflict. (2c)

The District Court's determination that the present conflict "would be 'capable of repetition, yet evading review'," affirmed on appeal (2d), is substantiated by the fact that employees at the Fairmont plant have filed (on at least two occasions in the past) claims for unemployment compensation because Westinghouse purportedly denied them "collective bargaining under generally prevailing conditions." *Hawkins v. Westinghouse Electric Corporation,* No. 8362 (Group) (W.Va. UCBR) (unpublished opinion dated August 9, 1957), *Reynolds v. Westinghouse Electric Corporation,* No. 9585 (Group) (W.Va. UCBR) (unpublished opinion dated Jan. 7, 1948).

On appeal, the Fourth Circuit, in a per curiam opinion, affirmed. It stated: "... [f]inding no error in the district court's determination that *New York Telephone Co. v. New York State Department of Labor,* 440 U.S. 519 (1979), is dispositive of this case, we affirm for reasons adequately stated in its opinion." (2a)

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is In Direct Conflict With Federal Labor Law Preemption Principles Clearly And Consistently Established In Prior Decisions Of This Court.

The District Court and the Fourth Circuit have held that the states may adjudicate the validity of an employer's practices in collective bargaining and condition an award of unemployment benefits to strikers upon

said review of the employer's practices.[5] This type of review of an employer's labor practices constitutes *de facto* regulation of those practices. This is well evidenced by the present case wherein, if Westinghouse is ultimately held to have engaged in an improper practice in its national bargaining with the IUE, the State of West Virginia will make an award of approximately one and one-half million dollars to the claimants and against Westinghouse.

More importantly, however, the Fourth Circuit's decision conflicts directly with this Court's decisions in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959), *Nash v. Florida Industrial Commission,* 389 U.S. 235 (1967) and *New York Telephone Co. v. New York State Department of Labor,* 440 U.S. 519 (1979).

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5. In administering the provisions of the West Virginia Unemployment Compensation Law dealing with award of unemployment compensation to strikers, the West Virginia Authorities (first the state unemployment compensation administrative officials and then the state courts) conduct an extensive review of the employer's conduct in bargaining, not merely to ascertain whether there was bargaining but to determine whether the employer committed any acts or practices which the state authorities deem improper. *E.g., Rolland Glass Co., supra.* Moreover, West Virginia state courts have repeatedly recognized that, in applying the exceptions in Sections 21A-6-3(4), they are required to interpret and apply principles similar to those reflected in the NLRA. *E.g., Union Carbide Corp.,* 11 (CCH) Unemployment Ins. Rep. ¶8259 (W.Va. Cir.Ct. 1967); *Rolland Glass Co., supra; Metalab-Labcraft Equipment Co. v. Board of Review, supra.* Despite this recognition, however, state courts in West Virginia have often applied those principles in a manner which directly conflicts with the NLRB's interpretation of that act regarding the very same incident. *E.g., Union Carbide Corp., supra. See also* Petition, *infra* at 20-21.

Reasons For Granting The Writ.

In *Garmon,* this Court elucidated a principle of labor law preemption which has been the cornerstone for nearly all of the decisions in which state regulatory schemes have been found to be preempted by the NLRA.[6] This principle, that state efforts to regulate or to prohibit activity that is either protected by §7, prohibited by §8, or at least arguably so protected or prohibited, was ignored by the Fourth Circuit. Rather than applying the preemption analysis espoused by *Garmon,* the Fourth Circuit reasoned that this Court's decision in *New York Telephone* was dispositive of this case. This determination, however, conflicts squarely with this Court's admonitions in *New York Telephone* and with the decision in *Nash.*

In *New York Telephone,* petitioning employers lodged a preemption attack against the State of New York's unemployment compensation law under which, after an eight-week waiting period, striking employees receive unemployment compensation benefits from an insurance fund financed primarily by employer contributions. 440 U.S. at 523. In marked contrast to this case, there was no claim in *New York Telephone* that the State sought to regulate or prohibit any conduct subject to the jurisdiction of the National Labor Relations Board (the "NLRB") under §8 of the NLRA. *Id.* at 529, 532. In fact, under the statute involved in *New York Telephone,* benefits were payable to strikers regardless of the nature of their strike or the nature of the bargaining conduct of the employer. Thus, this Court, in a plurality opinion authored by Justice Stevens, joined by Justices White and Rehnquist, ruled that the

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6. *New York Telephone Co. v. New York State Department of Labor,* 440 U.S. 519, 528-29 n.13, 14 (1979).

mere payment of unemployment benefits to striking employees is not preempted by the NLRA where such a state effort does not regulate or prohibit activity that is protected by §7 or prohibited by §8. The plurality based its decision on an absence of "compelling congressional direction" that "the Congress that enacted the NLRA in 1935, intended to deny the States the power to provide unemployment benefits for strikers." *Id.* at 540. Justice Brennan and Justice Blackman, joined by Justice Marshall, authored separate concurring opinions which refrained from joining the plurality's preemption analysis, but found, however, sufficient evidence of Congressional intent tolerating the interference or alteration of economic balance between employer and employee caused by an unemployment compensation statute such as New York's. *Id.* at 546, 549.

Unlike *New York Telephone,* however, there is neither "compelling congressional direction" nor any congressional intent here which allows states to regulate collective bargaining even through the administration of their unemployment compensation laws. In fact, the exact opposite holds true in the present case because there is "compelling congressional direction" that national collective bargaining be regulated and administered only by the National Labor Relations Board because Congress gave exclusive jurisdiction over such activity to that agency. 29 U.S.C. §158(a)(5). For this reason, the District Court and the Fourth Circuit could point to nothing more than this Court's decision in *New York Telephone* as evidence that the interference with collective bargaining, admittedly present in this case (6c), must be tolerated.

Significantly, however, the *New York Telephone* decision did not carve out a carte blanche exception to this

Court's labor law preemption doctrine for state unemployment compensation statutes. The decision was limited to a state unemployment compensation system which concedely did not serve to regulate the bargaining relationship between an employer and its employees, or to interfere with the NLRB's primary jurisdiction over the prohibitions in §8 of the NLRA. *Id.* at 528. It was for this reason that this Court recognized that ". . ., beyond identifying the interest in national uniformity underlying the doctrine, the cases comprising the main body of labor preemption law are of little relevance in deciding this case." *Id.* at 529, 530.

In addition, this Court's footnote 15 in the plurality opinion of *New York Telephone* and its reference to the *Nash* decision therein, strongly suggest that the main body of labor law preemption still has application to state unemployment compensation systems which regulate conduct prohibited in §8 of the NLRA.[7]

In footnote 15 in *New York Telephone,* this Court rejected the petitioning employers' claim that the NLRA forbids states from awarding unemployment compensation benefits to participants in illegal strikes. The petitioners were urging that this Court should adopt a rule

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7. *See* Comment, *Federal Preemption of State Welfare and Unemployment Compensation Benefits for Strikers,* 12 Harv. C.R.-C.L. L. Rev. 441, 459 n.86 (1977), which concludes that the payment of unemployment compensation benefits to strikers under an exception which awards benefits because an employer fails to conform to the provisions of a collective bargaining agreement or to laws regulating collective bargaining, such as Section 21A-6-3(4), does implicate *Garmon* as ". . . it involves them [the states] in precisely the same adjudicative process that is undertaken by the NLRB . . ." *Id.*

prohibiting a state from awarding benefits where the claimants were involved in an illegal strike. The Court rejected such an approach:

> "Because such a rule would inevitably involve the States in ruling on the legality of strikes under §8, it would invite precisely the harms that the preemption doctrine is designed to avoid." *Id,* at 529 n.15.

The Fourth Circuit's holding which permits the State of West Virginia to rule upon the legality of an employer's collective bargaining conduct under §8 of the NLRA permits the "same harms that the preemption doctrine is designed to avoid" and conflicts with this Court's decision in *New York Telephone* and *Garmon.* Thus, unlike *New York Telephone,* this Court is not being asked to extend the doctrine of labor law preemption into a new area because Section 21A-6-3(4), although its purported purpose relates only to unemployment compensation, *de facto* regulates activity within the central concern of the National Labor Relations Act.

For similar reasons, the decision below also conflicts with *Nash v. Florida Industrial Commission,* 389 U.S. 235 (1967). In *Nash,* this Court held that the NLRA preempted a state policy of denying unemployment compensation benefits to employees who filed unfair labor practice charges against an employer because such a state statute constituted *de facto* regulation and restriction of an employee's federally protected rights under §7 of the NLRA. 389 U.S. at 238-39. The *Nash* decision illustrates that the preemption doctrine does apply to the unemployment compensation area when a state attempts (through the grant or denial of benefits) to regulate rights and conduct within the scope of the NLRA. The *Nash* decision thus holds that states do

not enjoy an unlimited and unrestricted right in the administration of their unemployment compensation systems, contrary to the position taken by the District Court and the Fourth Circuit.

The present case amply demonstrates how the State of West Virginia, under Section 21A-6-3(4), regulates the bargaining relationship between Westinghouse and the IUE, a matter which is properly within the NLRB's primary jurisdiction. The conduct of the unemployment compensation hearing before the Appeals Tribunal in this case, and the testimony heard at that hearing, illustrate that Section 21A-6-3(4) has the effect of regulating the bargaining relationship between Westinghouse and the IUE and interferes with the NLRB's exclusive jurisdiction over the prohibitions in §8 of the NLRA. That hearing dealt solely with the conduct of the 1979 national collective bargaining negotiations between Westinghouse and the IUE. Significantly, this led the District Court to conclude that:

> "... the determinations required to be made by the state officials under the West Virginia unemployment compensation statute are similar to or exactly the same as certain determinations that are made by the National Labor Relations Board under the National Labor Relations Act." 7c.[8]

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8. The District Court's recognition that the state is making the same or similar determinations that the NLRB makes under §8 of the NLRA also conflicts with this Court's decision in *Sears, Roebuck & Co. v. Carpenters,* 436 U.S. 180 (1978), where it is stated that the critical inquiry in labor law preemption cases is whether the controversy before the state tribunal is the same as that as would be presented to the NLRB. *Id.* at 197.

Not only are the same determinations to be made by the state authorities as made by the NLRB under the NLRA, but the one and one-half million dollars in unemployment compensation benefits which will be charged against Westinghouse, is certainly as regulatory of an employer's conduct as any award by the NLRB.

For the reasons set forth above, the District Court and the Fourth Circuit's decisions are contrary to this Court's prior decisions in *Garmon, Nash* and *New York Telephone.*

2. The Fourth Circuit Incorrectly Decided An Important Issue of Labor Law Preemption.

As set forth in the prior section, we believe that the Fourth Circuit's decision was an incorrect one. Moreover, that decision erred in respect to a very important legal question.

If the decision below stands as law, this Court's carefully constructed doctrine of labor law preemption will be severely undermined. The decision below rejects not only the legislative judgment in favor of a uniform federal labor policy but also the Congressional decision to entrust the primary interpretation and application of its rules to a centralized expert tribunal, i.e., the NLRB. *Garner v. Teamsters Union,* 346 U.S. 485, 490-91 (1953). Similar concerns have led this Court to recognize that "the overriding interest in a uniform, nationwide interpretation of the federal statute by the centralized agency created by Congress not only demands that the NLRB's primary jurisdiction be protected, it also forecloses overlapping state enforcement of the prohibitions in §8 of the Act, . . ." *New York Telephone,* 440 U.S. at 528 [Citations and footnote omitted].

Reasons For Granting The Writ.

This Court's concern for a uniform, nationwide interpretation of the NLRA has particular application in cases involving collective bargaining.[9] To permit the states to regulate conduct so plainly within the central aim of federal regulation presents a real and substantial danger of conflict between the power asserted by Congress and the requirements imposed by state law. As explained *supra* at 7-8, the IUE filed charges with the NLRB regarding the same matters which were the basis of their claims before the state unemployment compensation authorities, but the whole subject of the state proceedings herein has been the propriety of Westinghouse's bargaining practices. If the decision below stands, the states will have an unlimited and unrestricted right to regulate and monitor employers' collective bargaining practices through the application of purportedly neutral laws of general applicability,[10] such as the unemployment compensation system challenged here. Thus, employers would be subject to conflicting regulation of collective bargaining by state authorities and the NLRB.

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9. *Machinists v. Wisconsin Employment Relations Commission,* 427 U.S. 132, 137 (1976); *Garmon,* 359 U.S. at 490-91; *Baker v. Newspaper & Graphic Communications Union,* 628 F. 2d 156, 162 (D.C. Cir. 1980). *See also* Cox, *Labor Law Preemption Revisited,* 85 Harv. L.R. 1337-1339 (1972).

10. Section 21A-6-3(4) is not exempt from preemption because it is a law of general applicability or because its purpose is to provide for awards of unemployment compensation benefits. In *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America v. Lockridge,* 403 U.S. 274 (1971), this court recognized that the stated purpose of a state statute is not dispositive for preemption purposes.

The potential for inconsistent regulation is real and substantial, not imagined. For example, the potential for inconsistent and divergent adjudications concerning collective bargaining made by the West Virginia unemployment compensation review tribunals, reviewing state courts and the NLRB has been conclusively demonstrated on many occasions. *Compare Union Carbide Corp.*, 11 (CCH) Unemployment Ins. Rep. ¶8259 (W.Va. Cir.Ct. 1967), *with Chemical Workers' International Union v. NLRB*, 405 F. 2d 1111 (D.C. Cir. 1968) where the Board of Review held that the employer had denied claimants the right of collective bargaining under generally prevailing conditions by insisting to the point of impasse on an allegedly improper, non-mandatory subject. The NLRB later ruled that that conduct did not violate the NLRA, *Union Carbide*, 165 NLRB 254 (1967), a decision which was affirmed by the United States Court of Appeals for the District of Columbia Circuit. 405 F. 2d at 1113. *See also Rolland Glass Co. v. Board of Review*, 11 (CCH) Unemployment Ins. Rep. ¶8262 (W.Va. Cir.Ct. 1967).

Requiring employers to conform their collective bargaining conduct to regulation by the states as well as by the NLRB undercuts the labor law preemption doctrine because it tolerates conflict in the regulation of collective bargaining. This result holds true particularly where, as here, an employer is engaged in nationwide operations and would be subject to regulation by many states.

At least six states have exceptions to the labor dispute disqualification provision of an unemployment compensation statute under which benefits are paid to otherwise ineligible strikers when an employer fails to

conform to laws regulating collective bargaining. Alaska Stat. §23.20 380(9)(c) (1972) ("failure or refusal of an employer to comply with an agreement or contract between the employer and the insured worker"); Ariz. Rev. Stat. Ann. §23-777(B) (1971) ("failure or refusal of an employer to conform to the provisions of an agreement or contract between employer and employee"); Mont. Rev. Codes Ann. §87-106(d) (1964) ("failure or refusal of any employer to conform to the provisions of any law of the states wherein the labor dispute occurs or of the United States pertaining to collective bargaining"); Pa. Stat. Ann. tit. 43, §802(b)(1) (Purdon Supp. 1979) ("no disqualification . . . shall be imposed if employees are denied the right of collective bargaining under generally prevailing conditions"); Utah Code Ann. §35-4-5(d)(1) (1974) ("failure or refusal to conform to the provisions of any law of the State of Utah or of the United States pertaining to hours, wages or other conditions of work"); W.Va. Code §21A-6-3(4) (1978).

Thus, employers could be subject to inconsistent and divergent regulation of collective bargaining from state to state. For example, one state might hold that one course of conduct should be followed by an employer in national bargaining, a second state might direct that another approach be taken, a third state might require a totally different approach, and the NLRB might hold that yet another inconsistent set of obligations exists. Thus, the same factual occurrences in a national bargaining situation (as was involved here) might be viewed differently by the different states and differently still by the NLRB. The approaches of the various states might be so inconsistent that a national employer such as Westinghouse may not be able to comply with one state's col-

lective bargaining requirements without violating those of another state or even those established by the NLRB.

The Fourth Circuit's interpretation of *New York Telephone* as sanctioning this interference with national labor policy and the erosion of the labor law preemption doctrine underscores the importance of reviewing this case. The decision below thus has a significant impact on the doctrine of labor law preemption. The dangers inherent in conflicting state regulation, the lack of state expertise and the frustration of national labor policy, which were not considerations before this Court in *New York Telephone,* 440 U.S. at 528-30, are of paramount concern here. The state statute involved in the *New York Telephone* case did not involve a situation in which the state was involved in the adjudication of whether unfair practices had been committed in the collective bargaining process. The decision below sanctions such adjudications by the state. Considerations of sound judicial administration of national labor policy justify the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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APPENDIX

Appendix A

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA

CIVIL ACTION NO. 79-3325-H

WESTINGHOUSE ELECTRIC CORPORATION,
a corporation,
Plaintiff,
vs.
MICHAEL R. WENGER, Commissioner,
West Virginia Department of Employment Security, and
J. F. MCCLANAHAN, CLARENCE ELMORE, and
JOHN T. POFFENBARGER,
Members of the Board of Review,
Defendants.

Bench Opinion

(reproduced from transcript of September 28, 1979)

Let me at the outset say that counsel have very adequately spoken, I think, to all the legal issues that might be before the Court. And I will try to summarize and address all the points that have been addressed by counsel.

Even though the counsel for the Board apparently only had notice last evening, she must have had opportunity to consult the authorities because I do consider those. And I consider many of those authorities to be appropriate to matters we spoke of here today.

Factually this case is, as I mentioned previously, distinguishable from the previously considered *FMC* case in that the action sought to be enjoined is apprehended by the parties in different ways, but it has not yet occurred. And there was a pending administrative

hearing before the Board of Review of the Department of Employment Security that is scheduled in the near future. So there is pending state action to be considered there.

Probably the first step in my analysis is whether or not there is a case or controversy and whether or not this dispute represented by the lawsuit, the subject matter of the lawsuit, is moot at the present time.

I would agree with counsel for the plaintiff that the dispute is not moot under the state of facts alleged, and that the *Super Tire Engineering Company* decision against MacCorkle would provide adequate support for that proposition. So there is a case in front of the court.

My next step in the analysis involves whether or not a temporary restraining order is appropriate under the circumstances. And in that I go to the relevant Fourth Circuit law that controls in this application for injunctive relief preliminary to the resolution of the litigation on the merits. And I refer the parties to the case of *Blackwelder v. Selig Furniture Company* and the *Fort Sumter* case, and more recent cases decided by the Fourth Circuit Court of Appeals.

In that regard I had to consider the irreparable harm that would accrue to the plaintiff if the injunctive relief is not granted at this time, and balance that against the irreparable harm that might accrue to the defendant if such relief is granted, then consider the possibility or the probability of the success on the merits from the plaintiff's standpoint, and also consider the public interest.

Okay. First, I have determined not to grant the temporary restraining order in this case on this basis:

That the irreparable harm cited by the plaintiff in this case, that is, the right, the asserted legal right to have these matters resolved by and under the jurisdiction of the National Labor Relations Act and the National Labor Relations Board.

The Court is not impressed with the assertion of the denial of the legal right. Obviously there would be some sort of opportunity at some point to assert that legal right. And factually I think that the implicit assertion that the litigation of some 1,700 claims before the Court of employment review would cause irreparable harm is one that just doesn't hold water.

The litigation process there obviously can be shortened somewhat by an agreed state of facts that would apply to most of the employees or most of the persons seeking to have a claim granted and that, I am sure, the Board could handle. I don't anticipate how it would handle it, but anyhow the inconvenience of litigation, a large number of claims, is not something that would present factual support for irreparable harm.

From the standpoint of the defendant, there are valid state policies which have been established and recognized for some period of time relating to the economic security of persons unemployed, however temporary. And the state legislature has addressed that on a number of occasions.

And, of course, the Executive Department of the government is committed to discharging the mandates of the legislature on a continuing basis to such employees. So anything that the Court might do at this point to upset or interfere with the orderly processes of the executive government would in my mind constitute a

relatively measurable amount of irreparable harm to the defendants in this case.

In the third regard, as to the possibility of success on the merits, I need only refer to the decision of the United States Supreme Court in the *New York Telephone* case. Even though that was only a plurality opinion, the United States Supreme Court has indicated a strong interest in not interfering in neutral state policies involving the economics of the employment relation and the decisions of the various states.

And so I think that the possibility of success on the merits, even with precise pleading, is somewhat remote in this case for the plaintiff.

The public interest, I think, would be served by the continuation of the status quo and to let the orderly state processes wind their way to conclusion.

Now, for that reason, I will not grant the application for the temporary restraining order or the injunctive relief at this time.

Now, as to the question of abstention, I am really addressing that to the merits, underlying merits of the controversy.

There has been asserted in this action an attack upon the language of the West Virginia statute on the basis that the language of the statute carries with it the opportunity to interpret an area of labor law which has been pre-empted by the NLRA and amending legislation enacted by the United States Congress, and that the supremacy clause of the United States Constitution would preclude the State of West Virginia addressing it in the manner that it has in the enactment of *W. Va. Code,* 1931, 21A-6-3, as amended, section, not subsection (4), but the entire section of the statute as amended.

Appendix A.

There are several principles that are involved here. As a broad principle, the *Younger* case apparently first articulated in a modern way that pending state proceedings should not be interfered with by way of injunction or otherwise by a federal forum if the opportunity exists to raise the federal constitutional question at some point in the state proceedings. That case has been recently reaffirmed and recognized in a broader and more general application in the 1979 decision rendered by the United States Supreme Court in the case of *Moore v. Sims*. And I think that decision has general applicability under the circumstances here.

I am aware of the decision of *Carter v. The City of Bluefield*. I am likewise aware of the fact that there have been at least several decisions in the state circuit where these cases are generally litigated as regards bringing them against some agency of the State of West Virginia, and that circuit now headed by Chief Judge McHugh and previously headed by Chief Judge Taylor, now deceased, is a circuit that is often given much weight and persuasiveness when you come around to the interpreting of the cases of the court of last resort, the Supreme Court of Appeals of West Virginia.

But, nevertheless, the *Carter* decision does not preclude a direct raising of the federal constitutional question in some proceeding before the state courts of general jurisdiction and the state court of appellate and original jurisdiction.

There are a number of ways under the judicial provisions of the West Virginia Constitution that such claims can be raised. And so I am not concerned that it cannot be raised before that forum.

And the question involved in this case is obviously one of compelling state interest which involves important state policy and one which should be resolved in the first instance as to both state and federal constitutional provisions by the Supreme Court of Appeals of West Virginia. And it has not so addressed that particular matter. And it ought to in the proper circumstances have that opportunity.

So I think that is reason enough to allow that matter to be presented to the West Virginia Supreme Court of Appeals. And I, the Court, would determine, based upon the present state of facts and considering that there is a state administrative proceeding which the Court considers to be a state proceeding to be pending, that the matter be resolved in the state forum in the first instance.

Now, as to the fourth matter, the Court normally, this Court would normally in any case where an abstention appears to have been validly raised abstain from resolving the issue but retain the matter on the docket to determine what, if anything, the state courts chose to do about the subject matter of the litigation. That would be my normal approach here.

But I would remind the parties that on a slightly different set of facts this Court, sitting in the Northern District of West Virginia, or addressing a Northern District of West Virginia case, has resolved this matter in a broad based ruling applying the plurality decision in the case of *New York Telephone Company* as to the basic matter raised.

And even taking the statement of facts as Mr. Post has precisely defined them before this Court, I still find

it to be indistinguishable from the thrust and the broad ruling that the Court handed down in the *FMC* case. And so the law of the Northern District of West Virginia rendered by this judge is asked to be, in effect, overlooked and ignored by this same judge sitting in the Southern District of West Virginia, or in a Charleston case. I think that might be confusing to the gentlemen who compose the Court of Appeals. And it is inappropriate because the attack was then and is now upon the facial validity of the statute in question. And though Mr. Post would say that the second exception under section 21A-6-3 would appear to be applicable, I do not think that a subsection of the statute, once attacked, is severable from that standpoint. The entire statute was before the Court in the Northern District case involving FMC at that point and it is now before the Court presently.

And so not being inclined to overrule this Court on a decision so recently made, this Court will stand on its previous ruling and await the outcome of the decision of the Fourth Circuit Court of Appeals in the other case. And I will thus not abstain and retain the case on the docket; rather I will abstain and dismiss this case on the merits and send it on its way.

Delivered by:
CHARLES H. HADEN II
United States District Judge

Appendix B

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA

CIVIL ACTION NO. 79-3325-H

WESTINGHOUSE ELECTRIC CORPORATION,
a corporation,
Plaintiff,
vs.
MICHAEL R. WENGER, Commissioner,
West Virginia Department of Employment Security, and
J. F. MCCLANAHAN, CLARENCE ELMORE, and
JOHN T. POFFENBARGER,
Members of the Board of Review,
Defendants.

Order

(filed November 1, 1979)

Plaintiff has moved the Court, by counsel, to reconsider the Court's previous denial of the Plaintiff's motion for injunctive and declaratory relief. In support of its motion, the Plaintiff has submitted to the Court the affidavit of Samuel O. Lemon, Jr., Assistant Director of Personnel Relations for Westinghouse Electric Corporation, which Plaintiff contends constitutes "new evidence."

Mr. Lemon states, *inter alia,* that he has participated in hearings conducted by the Appeals Tribunal of the West Virginia Department of Employment Security. In essence, Mr. Lemon's affidavit purports to demonstrate that, in determining the eligibility of Westinghouse employees for unemployment compensation benefits for the time period during which they were engaged in a strike against Westinghouse, the West Virginia officials are considering evidence, and will have to make determinations of the same nature as those that are made by the National Labor Relations Board. The Plaintiff contends that the character of the determinations made by the

state officials unlawfully injects the state into the Labor Management Relations field and as such is preempted by federal labor law.

The Court has considered this argument in ruling on the Plaintiff's prior requests for relief. The Court incorporates its previous ruling herein. The Court once again concludes that, regardless of the characterization of the determinations made by state officials pursuant to the state unemployment compensation act, the whole import of the determinations, and proceedings in general, is to determine the eligibility of strikers for unemployment benefits. The Court recognizes the logical force of the Plaintiff's argument. Nevertheless, the Court has concluded that, notwithstanding the type of determination made by state officials, the result is merely the granting or denial of unemployment benefits under state law and as such falls within an area that is not preempted by federal labor law but rather is left to the province of the states under the rule of *New York Telephone Company v. New York State Department of Labor,* ..... U.S. ....., 47 U.S.L.W. 4303 (U.S., March 21, 1979).

In accordance with the foregoing, the Court hereby ORDERS that the affidavit of Samuel O. Lemon be filed as a part of the record in this case. The Court further ORDERS that the Plaintiff's motion for reconsideration of the Court's denial of injunctive and declaratory relief is denied.

The Clerk is directed to send certified copies of this Order to all counsel of record.

ENTER: 11/1/79
/s/ CHARLES H. HADEN II
Charles H. Haden II
United States District Judge

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CIVIL ACTION NO. 79-3325-H

WESTINGHOUSE ELECTRIC CORPORATION,
a corporation,
Plaintiff,
vs.
MICHAEL R. WENGER, Commissioner,
West Virginia Department of Employment Security, and
J. F. McCLANAHAN, CLARENCE ELMORE, and
JOHN T. POFFENBARGER,
Members of the Board of Review,
Defendants.

Memorandum Order and Opinion

(filed November 26, 1979)

In this action the Plaintiff requested the Court to grant injunctive relief in the form of a temporary restraining order to enjoin Defendants from conducting an unemployment compensation appeal tribunal proceeding pursuant to *West Virginia Code,* 1931, §21A-7-7, as amended, and also sought a declaratory judgment that *West Virginia Code,* 1931, §21A-6-3, is unconstitutional because it violates the Supremacy Clause of the Constitution of the United States. The Court heard the case at a hearing on September 28, 1979. The case was considered on the basis of the pleadings, affidavits, motions and memoranda of law as well as the arguments of counsel. This Order reflects the Court's bench rulings made at the September 28th hearing. Counsel for all parties ably briefed and argued their respective posi-

tions. The Court will not restate in this Order the various legal arguments asserted.

First, the Court found, despite the possibility that certain actions by the Defendants subsequently could render the case moot, that there is a subsisting case or controversy on the facts as alleged by the Plaintiff. Moreover, it appeared to the Court that the matter in conflict would be "capable of repetition, yet evading review" even if the need for injunctive relief subsequently was rendered moot by actions of the Defendants. See *Super Tire Engineering Company v. McCorkle,* 416 U.S. 115 (1974).

The Court also considered the Defendants' arguments that abstention was proper. Although the Court considered that abstention could have been appropriate in this case under certain circumstances, the Court's actions in addressing the merits of the request for injunctive relief as well as the merits of the declaratory judgment request, demonstrate that the Court did not abstain. Nevertheless, the Court did find that, under West Virginia law, the Plaintiff was not barred from obtaining a review of the constitutionality of the state statute in question from state courts of general jurisdiction.

The Court next considered the Plaintiff's motion for injunctive relief. Analysis of the competing interests, weighed in light of the applicable law in this circuit, led the Court to conclude that the injunctive relief should be denied. *Blackwelder Furniture Company v. Selig Manufacturing Company,* 550 F. 2d 189 (4th Cir. 1977); *Fort Sumter Tours, Inc. v. Andrus,* 564 F. 2d 1119 (4th Cir. 1977); *North Carolina States Ports Authority v.*

Dart Containerline Company, Limited, 592 F. 2d 749 (4th Cir. 1979).

The Plaintiff argued that the irreparable harm it would suffer should the Court deny the injunctive relief requested was: (1) that the Plaintiff would be denied its "legal right" to have this purported matter of labor management relations resolved by the National Labor Relations Board; and (2) that the Plaintiff would be required to litigate 1,700 unemployment compensation cases before the State Administrative Tribunal.

It did not appear to the Court that the Plaintiff would be denied its asserted legal right to have labor management relations problems resolved by the National Labor Relations Board. Although the actions of the West Virginia Department of Employment Security and the Board of Review obviously have a pragmatic and tangential effect on the legal rights of the Plaintiff, they in no way preclude the Plaintiff from asserting any such rights before the National Labor Relations Board. Moreover, the Court found that the Plaintiff's implied assertion that it would have to litigate 1,700 unemployment compensation claims before the State Administrative Tribunal to be without merit. There is no dispute that a single set of facts, and an identical legal-administrative set of principles, apply to the determination of all 1,700 claims. Further, all 1,700 claims could be, and probably would be, determined on that single set of factual legal contentions. Therefore, the Plaintiff would be exposed to the litigation of one real case, and not 1,700 cases, by the denial of the injunctive relief sought.

The Court found that the Defendants would suffer significant irreparable harm if the injunctive relief was

granted. The Court found that enjoining the ongoing state administrative process would be an undue interference with the orderly processes of the executive branch of the state government. Additionally, the granting of injunctive relief would interfere with the execution of valid state policies under a state statute that has been in effect for many, many years, and one which expresses the mandate of the state legislature.

The Court next considered the Plaintiff's probability of success on the merits in this case. The Court found that Plaintiff's likelihood of success on the merits was, in this Court's view, relatively slight because of the principles enunciated in Part III of the plurality opinion in *New York Telephone Company v. New York State Department of Labor,* ..... U.S. ....., 47 U.S.L.W. 4303 (U.S. March 21, 1979). This Court has interpreted the *New York Telephone* case as expressing a strong policy that state determinations of eligibility for state unemployment compensation benefits be left to the province of the states notwithstanding that they may otherwise pragmatically affect labor management relations.

Finally, the Court had to consider in the balance the "public interest". The Court found that the public interest is manifested by the policy of the State of West Virginia to provide unemployment compensation benefits to those persons whom the state deems eligible; and that the public interest is best served by allowing the unhindered continuation of orderly state processes aimed to insure the economic security of the citizens of the state. Accordingly, the Court found that the public interest was served by denying the injunctive relief sought.

Weighing the above four factors in the balance, the Court found that the balance was decidedly struck in

favor of the Defendants and, accordingly, the Court denied the Plaintiff's motion for a temporary restraining order.

Although the Court, upon the arguments of counsel, considered the applicability of abstention principles to this matter, it has previously, while presiding in the Southern District of West Virginia, ruled upon the constiutionality of the statute here in question. *FMC Corporation v. West Virginia Department of Employment Security, et al.,* Civil Action Number 79-0040-C(H) (N.D.W.Va. June 21, 1979). Accordingly, the Court likewise addressed the merits of the declaratory judgment sought by the Plaintiff.

Counsel for the Plaintiff attempted to distinguish this Court's ruling in the *FMC* case, both on the facts and also on the basis that the *FMC* case involved a different subsection of *West Virginia Code,* 1931, §21A-6-3, than that involved herein. Nevertheless, the Court found that, as applied to a challenge of the facial constitutionality of the statute, that the *FMC* case was indistinguishable. The subsection of the statute involved in the *FMC* case, as well as that involved in this case, both colorably affect the balance of labor management relations. That, of course, is the basis upon which the Plaintiff here, as well as the Plaintiff in the *FMC* case made challenges to the constitutionality of the state statute.

This Court views the *New York Telephone* case as explicating a congressional intent to leave the issue of the determination of eligibility for state unemployment compensation benefits to the states. Counsel for the Plaintiff contends that the statute involved in the *New York Telephone* case was a "neutral statute", while the West Virginia statute impermissibly intrudes into the

preempted area of labor management relations and thus violates the Supremacy Clause of the United States Constitution. This Court has concluded that, regardless of the characterization of the determinations made by state officials pursuant to the state unemployment compensation act, the whole import of those determinations was to determine the eligibility of strikers for unemployment benefits. Notwithstanding the characterization of the determinations made by state officials, the result is merely the granting or denial of unemployment benefits under state law and, as such, falls within an area that is not preempted by federal labor law but it rather is left to the province of the states under the *New York Telephone* case. Obviously, the granting of unemployment compensation benefits to strikers, as in the *New York Telephone* case, does have an actual and practical effect on the balance of labor management relations. This Court also recognizes that the determinations required to be made by the state officials under the West Virginia unemployment compensation statute are similar to or exactly the same as certain determinations that are made by the National Labor Relations Board under the National Labor Relations Act. Nevertheless, the intent and purpose of the West Virginia unemployment compensation statute is not to regulate, interfere with or upset the balance of labor management relations, but is to serve as a means of determination of eligibility for unemployment compensation benefits. Therefore, this Court holds that *West Virginia Code,* 1931, §21A-6-3, as amended, does not impermissibly intrude in the area of labor management relations that is preempted by federal labor law, and further, the statute does not violate the Supremacy Clause of the United States Constitution.

In light of the Court's foregoing rulings, there is no further relief that the Plaintiff has sought or may obtain from this Court, and, accordingly, the Court hereby ORDERS that the case be DISMISSED from the docket of this Court.

The Clerk is directed to send a certified copy of this Memorandum Order and Opinion to all counsel of record.

ENTER: 11/26/79
/s/ CHARLES H. HADEN II
Charles H. Haden II
United States District Judge

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1025

WESTINGHOUSE ELECTRIC CORPORATION,
Appellant,
vs.
MICHAEL R. WENGER, Commissioner,
West Virginia Department of Employment Security,
J. F. McCLANAHAN, CLARENCE ELMORE, and
JOHN T. POFFENBARGER,
Members of the Board of Review,
Appellees.

Appeal from the United States District Court for the Southern District of West Virginia, at Parkersburg.
Charles H. Haden, II, District Judge.

Argued: July 9, 1980
Before: WINTER, BUTZNER and ERVIN, Circuit Judges
(filed September 15, 1980)

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Opinion of The Court

PER CURIAM:

Westinghouse appeals the district court's finding that *W. Va. Code* 21A-6-3(4) (1931) does not violate the Supremacy Clause of the Constitution of the United States. Finding no error in the district court's determination that *New York Telephone Co. v. New York State Dept. of Labor,* 440 U.S. 519 (1979) is dispositive of this case, we affirm for reasons adequately stated in its opinion. *Westinghouse Electric Corp. v. Wenger,* No. 79-3325-H(h) (S.D.W.Va. Nov. 26, 1979).

AFFIRMED.

Appendix E

Statutory Provisions Involved

National Labor Relations Act: Sections 8(a)(1), 8(a)(5), 8(d) and 10(a)

The pertinent statutory provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. §151 *et seq.* (1976) are the following:

> Section 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.
>
> * * *
>
> Section 8(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-

bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

* * *

Appendix E.

Section 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.